

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

JAN 26 1998

In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of Section 309(j)) MM Docket No. 97-234

of the Communications Act --)

Competitive Bidding for Commercial)

Broadcasting and Instructional Television)

Fixed Service Licenses)

Re-examination of the Policy) GC Docket No. 92-52

Statement on Comparative)

Broadcasting Hearings)

Proposals to Reform the Commission's) GEN Docket No. 90-264

Comparative Hearing Process to)

Expedite the Resolution of Cases)

TO: The Commission

**COMMENTS OF VARIOUS
POST-JULY 1, 1997 FM APPLICANTS**

These comments are filed on behalf of numerous FM applicants that have filed applications for new FM stations in response to FM cutoff windows after July 1, 1997.¹ These comments oppose re-opening any window which has already closed to allow additional parties to bid at an auction.

¹ The commenting applicants are: Big Ben Broadcasting, New London, IA, (December 29, 1997); Crow Creek Broadcasting, Wessington Springs, SD, File No.: 971229MG; New Wave Broadcasting, Newaygo, MI, File No.: 971218MF; Oak Tree Broadcasting, Oakley, UT, File No.: 971120MG; Vin Broadcasting, Vinton, IA, File No.: 971107MH; Rekab Broadcasting, Baker, CA, File No.: 971107MC; Poor Mountain Broadcasting, Shawsville, VA, File No.: 971023MC; Pine Broadcasting Company, Pocono Pines, PA, File No.: 971009MJ; Truckster Broadcasting, Truckee, CA, File No.: 971003MF; Kentucky Broadcasting, Lexington, IL, File No.: 970911M2; Boat of Steam Broadcasting, Steamboat Springs, CO, File No.: 970911ML; Port Wine Broadcasting, Portsmouth, OH, File No.: 970911MZ; Mountain of Snow Broadcasting, Snow Hill, MD, File No.: BPH-970911M4; Torro Broadcasting, Orofino, ID, File No.: 970904MH; General Randolph Broadcasting, Randolph, UT, File No.: BPH-970904MK; Pacific Bay Broadcasting, Coos Bay, OR, (July 30, 1997); Radio Oro Broadcasting, Oro Valley, AZ, File No.: BPH-970724NA; Big Bula Broadcasting, Ashtabula, OH, File No.: 970724MW; By the Bay Broadcasting, Bayboro, NC, File No.: 970724MV; Magic City Media, Forest City, PA, File No.: 970717MK; Michael Radio Group, Glenrock, WY, File No.: 971010MG; Magic City Media, Laramie, WY, File No.: 971107MH; Michael Radio Group, Lost Cabin, WY, File No.: 971120MF; Michael Radio Group, Newcastle, WY.

No. of Copies rec'd
List A B C D E

In the *Notice or Proposed Rulemaking* at ¶42, the Commission states:

With respect to the pending broadcast and secondary broadcast applications, described in ¶39 above, the time for filing mutually exclusive applications under our existing procedures has, in many instances, expired. In contrast to new section 309(l), which expressly restricts the group of applicants eligible to participate in an auction, section 309(j)(1) is silent on that question. It neither precludes the Commission from restricting the class of eligible bidders to the applicants already on file, nor requires that the Commission reopen the filing period for additional applicants that would be eligible to participate in the auction. Thus, we appear to have discretion as to whether we conduct a closed auction that is limited to these pending mutually exclusive applicants, or whether we include these applicants within our first general broadcast auction, and permit new applicants to file additional applications that may be mutually exclusive with the pending applicants. We ask for comment on how we should exercise this discretion, i.e., should we open the windows or keep them closed?

Both the equities and policy considerations weigh heavily in favor of keeping the windows closed that have closed. Each of the applicants commenting has invested considerable resources in time and money to timely prepare and file its application. Sites were located, long-form applications were completed, legal fees and engineering fees paid, and financial arrangements made. This money and expense was incurred at the direction of the Commission in its various *Reports & Orders* establishing fixed dates for filing applications. The applicants filing applications had every expectation to believe that, although the *mechanism* for determining a winner was undecided, that the participants in any auction for the facility would be determined by the close of the filing window. This was also the Commission's intent. Otherwise, it could have easily (as it does now in Report & Orders allocating channels) allocated channels without establishing a cutoff window.

Aside from the equities, there are numerous public interest benefits in not re-opening the windows. First, permits can be awarded more expeditiously by conducting an auction now without further ado. No one who has failed to file an application can claim to be prejudiced since public

notice has already been published of the availability of each frequency. Furthermore, it is safe to presume that the parties that are genuinely interested in the facilities have already filed applications.

Unlike other provisions of the *Balanced Budget Act of 1997*, where the Commission is affirmatively required to take specific action, new Section 309(j)(1) does not require that the Commission re-open windows that have closed. Under the circumstances, it would be arbitrary and capricious for the Commission to have required that applications be filed by the window cutoff and *then* change its rules without substantial justification. There does not appear to be substantial justification for re-opening the windows. It would only undermine the notion of administrative finality and would prolong the issuance of construction permits in these markets for no quantifiable benefit. The truly serious applicants have already filed. These applicants have already expended considerable resources to file applications and are, therefore, likely to be serious bidders. Although opening a window may draw additional applicants into the proceeding, the Commission's proposed minimal auction participation requirements would allow these new applicants to benefit from engineering already prepared by applicants on file. Re-opening the windows would result in an anomalous situation where applicants would be allowed to participate on an unequal footing. The new applicants would be allowed to benefit from the engineering and from a product already generated by the old applicants. Furthermore, the applicants already on file will find themselves in an auction having expended considerably more money than any of the newer applicants and would have, therefore, less money available to bid. This is fundamentally unfair and would amount to an arbitrary and capricious rulemaking.

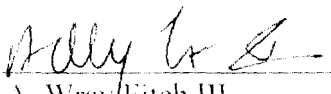
Paragraph 45 of the *Commission's Notice of Proposed Rulemaking* states:

Settlements. We tentatively propose that, before the deadline for filing the short-form applicants, pending applicants not subject to the special provisions set forth in new

section 309(l) may enter into settlement agreements pursuant to section 311(c) of the Act and the Commission's rules. Nothing in amended section 309(j)(1), or in the accompanying legislative history, requires any change in the Commission's disposition of such settlement agreements. However, as noted in ¶73 below, there is a question as to the extent to which auction participants may enter into a settlement agreement without violating our anti-collusion rules. We tentatively conclude that permitting settlements prior to the filing of the short-form application is adequate to protect the integrity of the competitive bidding process and consistent with the anti-collusion rules. We ask for comment on whether allowing settlements prior to the short-form application deadline preserves the integrity of the auction process. And, although we have generally permitted settlements before short-form applications are filed, we ask for comment on whether the Commission should, as a matter of policy, amend its rules to prohibit such agreements now that Congress, through the Balanced Budget Act, may have established auctions as the preferred method of awarding spectrum licenses where mutually exclusive applications are accepted.

These comments fully support allowing settlements prior to the short-form filing deadline. Once parties interested in a particular facility are identified, the Commission should afford the applicants a 30-day period in which to reach a settlement. Settlements are in the public interest since they allow for earlier inauguration of a new broadcast service. Furthermore, allowing settlements involving a merger of one or more parties oftentimes results in a superior operator by allowing talents and resources to combine and provide better service.

Respectfully submitted,

By 
A. Wray/Fitch III
Counsel for Various Post-
July 1, 1997 FM Applicants

GAMMON & GRANGE, P.C.
8280 Greensboro Drive, 7th Floor
McLean, VA 22102-3807
(703) 761-5000

January 26, 1998

JKL 0524 COMMENTS.AWF